Petition

81-738

No. .....

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IN THE

Supreme Court of the United States

October Term, 1981

NORTHWEST SPORTS ENTERPRISES, LTD., a corporation
Petitioner,

v.

SEATTLE TOTEMS HOCKEY CLUB, INC.;
ELDRED W. BARNES and VINCENT H.D. ABBEY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 14, 1981

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QUESTION PRESENTED FOR REVIEW

May an American court, consistent with the principles of international comity, enjoin a non-American corporation domiciled in a foreign country from suing in a court of the foreign country on a contract which was made in the foreign country, which designated foreign law as the governing law and which provided for payment in the foreign country of the amounts due?

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OPINION BELOW

The opinions of the court of appeals, not yet reported, and of the district court, not reported, appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 3, 1981, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked by respondents under 15 U.S.C. §§1, 2, 3, 4 and 15 and 28 U.S.C. §1337.

In an agreement dated May 1974 the petitioner Northwest Sports Enterprises, Ltd.[1] entered into a contract (hereinafter the "May 1974 Agreement") at Vancouver, British Columbia, Canada with respondents Vincent H. D. Abbey, Eldred W. Barnes and Seattle Totems Hockey Club, Inc. under which the respondents agreed that, upon the announcement of the award of a National Hockey League franchise for the Seattle Totems, Messrs. Abbey and Barnes would purchase the majority interest in the Totems held by Northwest Sports and repay to Northwest Sports all debts owed to Northwest Sports by the Seattle Totems. The sale and repurchase was to take place in Vancouver, British Columbia. The debts were to be repaid in installments at the prime lending rate charged by the Bank of British Columbia. Disputes with respect to the contract were to be decided under the laws of British Columbia (Excerpts of Record [ER] 56-63).

In June, 1971 the National Hockey League announced that the City of Seattle, represented by Mr. Abbey, had been awarded a franchise conditional upon the Seattle representatives meeting certain financial and other obligations (ER 76). Thereafter, pursuant to the May 1974 Agreement, Messrs. Abbey and Barnes purchased Northwest Sports'

1. Northwest Sports Enterprises, Ltd. is a publicly owned company, 68 percent of whose shares are owned by Western Broadcasting Sports, Ltd., a Canadian corporation. All of the stock of Western Broadcasting Sports, Ltd. is owned by Western Broadcasting Company, Ltd., also a Canadian corporation. (Supplied in compliance with United States Supreme Court Rule 28.1).

shares, but they did not repay the loans and advances which were due and owing (ER 53-55).

On November 13, 1975 Abbey, Barnes and the Seattle Totems filed a complaint against the National Hockey League, Northwest Sports Enterprises, Ltd. and other defendants alleging violations of United States antitrust laws, seeking damages and seeking a declaratory judgment holding the May 1974 Agreement void (ER 1-27).

On May 25, 1978 Northwest Sports Enterprises, Ltd. filed a claim in the Supreme Court of British Columbia seeking amounts due and owing under the May 1974 Agreement (ER 74-81).

Subsequently, respondents moved for and on February 9, 1979 obtained an order from the United States District Court for the Western District of Washington, enjoining petitioner from further prosecution of their suit in British Columbia (ER 157-159). The district court's order was affirmed by the Ninth Circuit Court of Appeals on August 3, 1981.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decision Of The Third Circuit In *Compagnie des Bauxites de Guinea v. The Insurance Company of Ireland, et al.*, For Which A Petition For A Writ of Certiorari Is Now Pending Before This Court (No. 81-290)[2]

On June 10, 1981, the Third Circuit in *Campagnie des Bauxites de Guinea v. The Insurance Company of Ireland, et al.*, No. 80-2416 (3d Cir. June 10, 1981), *petition for cert. filed*, 50 U.S.L.W. 3231 (U.S. August 12, 1981) (No. 81-290), reversed the judgment of the United States District

2. The Third Circuit relied on this Court's decisions in *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922) and *Donovan v. City of Dallas*, 377 U.S. 408 (1964) which are discussed in Part 2 below.

Court issuing an injunction against proceedings brought by defendants therein in the courts of England. While one judge dissented in part on a different issue, the Third Circuit panel was unanimous in its reversal of the injunction order.

The facts of the Third Circuit case and the present case are a mirror image of one another. In the present case, the first suit sought rescission of the disputed contract; the second suit brought in Canadian courts sought monies due under the same contract. In the Third Circuit case, the first suit sought monies due under the contract while the second suit in England sought rescission of the contract.

In most respects there are fewer grounds for enjoining the foreign suit in this case than there were in the case considered by the Third Circuit. Thus, the delay between the initiation of the first and second suit in the present case was two and a half years; the delay in the Third Circuit case was nearly four years. Further, insofar as the convenience of the parties is concerned, the seat of the foreign court, Vancouver, British Columbia, is only three hours by car from the seat of the United States District Court in Seattle; in the Third Circuit case, the two courts are separated by the Atlantic Ocean.

Finally, insofar as the issues are concerned, there is duplication in both cases; however, in the instant case the successful prosecution of petitioner's claims for damages in British Columbia will leave the respondents' damage claims in the United States District Court substantially intact, while, in the Third Circuit case, the successful prosecution of the claim filed in English courts would entirely eliminate the basis for the claim for monies due in the American court.

2. The Decision Below Conflicts With This Court's Decisions In *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922) And *Donovan v. City of Dallas*, 377 U.S. 408 (1964) And Raises Significant And Recurring Problems Concerning The Duty Of An American Court To Exercise Restraint In Enjoining Non-American Corporations From Suing In A Court Of A Foreign Country On A Contract Made In The Foreign Country

This Court has long held that the court of one sovereignty will not interfere with or try to restrain *in personam* proceedings in the court of another sovereignty:

> [W]here the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.

Kline v. Burke Construction Co., 260 U.S. 226, 231-32, 43 S. Ct. 79, 67 L. Ed. 226 (1922). *See also, Princess Lida v. Thompson*, 305 U.S. 456, 466, 59 S. Ct. 275, 83 L. Ed. 285 (1939); *Donovan v. City of Dallas*, 377 U.S. 408, 412, 84 S. Ct. 1579, 12 L. Ed. 2d 409 (1964). If this principle applies between the courts of different sovereignties within the United States it applies *a fortiori* to the courts of foreign nations.

The proper application of the doctrine of comity to proceedings in non-American courts is an issue which has arisen in numerous circuits with conflicting results. In *In re Unterweser Reederei, GMBH*, 428 F.2d 888 (5th Cir. 1970), *aff'd on rehearing en banc*, 446 F.2d 907 (1971), *rev'd on other ground sub. nom. The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972), the Fifth Circuit affirmed an order enjoining a subsequent action in an English court. However, the defendant had itself invoked the jurisdiction of the federal district court with respect to some claims and the matter was at least partly *in rem* insofar as the federal district court was concerned.

In *Canadian Filters (Harwich), Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577 (1st Cir. 1969), an order of injunction was reversed, the court stating that the defendant had the right to prefer the Canadian courts to determine its rights to damages under Canadian patent law regardless of whether the second suit was an inconvenience or involved duplicative issues. *Id.*, at 579. Similarly here, petitioner should be permitted to choose the Canadian forum to litigate its rights under Canadian contract law.

In *Sperry Rand Corp. v. Sunbeam Corp.*, 285 F.2d 542 (7th Cir. 1960), the Seventh Circuit reversed an order enjoining plaintiff from bringing a foreign suit where the disposition of the action in federal court would not dispose of the issues raised in the foreign action. Similarly here, the disposal of respondent's claims in federal district court, if they do not result in rescission of the May 1974 Agreement, would leave unresolved numerous issues of both liability and damage as to petitioner's contract claims which under the contract are to be decided based on the laws of British Columbia.

Where the issue is one of restraining a party from pursuing an *in personam* action in the court of a foreign jurisdiction, the opinions of this Court previously cited command restraint. Even under the more permissive of the circuit court opinions, comity "requires that such action be taken only with care and great constraint." *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., supra,* at 578. In affirming the injunction of petitioner's legal proceedings in British Columbia, the court below failed to exercise the restraint required by principles of comity.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

SCHWEPPE, DOOLITTLE, KRUG,
TAUSEND & BEEZER, P.S.

By_____
Fredric C. Tausend

By_____
James B. Street
Counsel of Record for Petitioner

October 14, 1981

Appendix

APPENDIX A

SEATTLE TOTEMS HOCKEY CLUB, INC.,
ELDRED W. BARNES
and VINCENT H.D. ABBEY,
Plaintiffs-Appellees,

v.

THE NATIONAL HOCKEY LEAGUE, et al.,
Defendants,

NORTHWEST SPORTS ENTERPRISES, LTD.,
Defendant-Appellant.

No. 79-4209.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued and Submitted Jan. 7, 1981.
Decided Aug. 3, 1981.

Owners of Seattle hockey team brought antitrust action against the National Hockey League, owners of Vancouver team in the NHL, and others charging defendants with unlawful monopolization and seeking, among other relief, to have certain agreements between them and owners of the Vancouver team declared void and unenforceable. Subsequently, owners of the Vancouver team brought action against plaintiffs in Canadian court for damages for

breach of same agreements that were being challenged as illegal and unenforceable in plaintiffs' antitrust action. The United States District Court for the Western District of Washington, Donald S. Voorhees, District Judge, granted plaintiffs' motion to enjoin owner of the Vancouver team from prosecuting its contract claim in Canada, and defendant appealed. The Court of Appeals, Norris, Circuit Judge, held that: (1) District Court properly looked to Federal Rules of Civil Procedure, and not Canadian law, to determine whether defendant's contract claim was to be pleaded as a compulsory counterclaim in the federal antitrust action pending before it, and (2) District Court did not abuse its discretion by enjoining defendant from prosecuting its contract claim in Canadian court.

Affirmed.

1. Federal Civil Procedure -- 775

District court properly looked to Federal Rules of Civil Procedure, and not Canadian law, to determine whether Canadian defendant's contract claim was to be pleaded as a compulsory counterclaim in federal antitrust action pending before it, notwithstanding language in the contract that the agreement was to be interpreted in accordance with Canadian law. Fed.Rules Civ.Proc. Rule 13(a), 28 U.S.C.A.

2. Federal Civil Procedure -- 775
Federal Courts -- 1149

Federal rule requiring a defendant in federal court to state as a counterclaim any claim he may have against plaintiff that "arises out of the transaction or occurrence that is the subject matter" of plaintiff's claim bars a party who failed to assert a compulsory counterclaim in one action from instituting a second action in which that counterclaim is basis of the

complaint and, in order to enforce this bar, a federal court may enjoin a party from bringing its compulsory counterclaim in a subsequent federal court action. Fed. Rules Civ.Proc. Rule 13(a), 28 U.S.C.A.

3. Courts -- 516

A federal district court with jurisdiction over the parties has power to enjoin them from proceeding with an action in courts of a foreign country, although the power should be used sparingly.

4. Courts -- 516

District court did not abuse its discretion by enjoining Canadian defendant in antitrust case pending before it from prosecuting, in Canadian court, its contract claim involving same agreements that were being challenged as illegal and unenforceable in the antitrust action. Fed.Rules Civ.Proc. Rule 13(a), 28 U.S.C.A.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, POOLE, and NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

This appeal arises out of a private antitrust action brought in federal district court by appellees Vincent Abbey and Eldred Barnes, owners of the Seattle Totems, an ice hockey team in the now-defunct Western Hockey League. Named as defendants were the National Hockey League (NHL), Northwest Sports, owners of the Vancouver Canucks of the NHL, and various League officers and club owners. The suit charges defendants with unlawful monopolization of the ice hockey industry in North America and seeks, among other relief, to have certain agreements between Abbey and Barnes and Northwest Sports relating to the

sale and management of the Seattle Totems declared void and unenforceable.[1]

Approximately twenty-seven months after the filing of the antitrust action, Northwest Sports sued Abbey and Barnes in British Columbia Supreme Court for damages for breach of the same agreements that are being challenged as illegal and unenforceable in the appellees' antitrust action in federal district court. Abbey and Barnes then moved in the federal court action to enjoin Northwest Sports from prosecuting its contract claim in British Columbia on

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[1]The agreements called for Abbey and Barnes to sell to Northwest Sports 55% of the Totems and to pay Northwest Sports 44.44% of all moneys expended by Northwest Sports in the operation of the Totems franchise. The agreements also called for Abbey and Barnes to repurchase all the shares held by Northwest Sports in the Totems if the NHL granted the Totems an NHL franchise.

The agreements were executed in Vancouver, and paragraph 18 of the agreement which Abbey and Barnes allegedly breached provided that "[t]his agreement shall be interpreted in accordance with the laws of the Province of British Columbia."

the ground that the claim constitutes a compulsory counterclaim to plaintiffs' antitrust complaint and must be pleaded in the pending federal antitrust action in Washington. The district court granted plaintiffs' motion and issued the injunction against prosecution of the Canadian suit. Northwest Sports appeals pursuant to 28 U.S.C. § 1292(a)(1).

I.

Northwest Sports does not deny that under Federal Rule of Civil Procedure 13(a) its contract claim would constitute a compulsory counterclaim in the pending antitrust action. Rather, it contends that Canadian law, and not Rule 13(a), governs the determination whether the contract claim is compulsory and that Canadian law would not require Northwest Sports to plead its claim as a compulsory counterclaim in the pending antitrust suit. In concluding that Rule 13(a) governs, the district court

below relied on the general choice of law principle, restated in § 122 of the Restatement (Second) of Conflict of Laws (1971), that a court will apply its own rules of procedure to regulate the conduct of litigation before it.[2] See also Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2nd Cir. 1955). Northwest Sports argues, however, that this general rule is inapplicable because the issue in question is "one whose resolution would be likely to affect the ultimate result of the case." Restatement (Second) of Conflict of Laws § 122, Comment a (1971). We find this argument without merit.

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[2]Restatement (Second) of Conflict of Laws § 122 (1971) states:

> A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.

The issue before this court is not whether Canadian law governs the interpretation or the validity of the agreements between Northwest Sports and appellees, but rather whether all claims arising out of these agreements should be heard in a single forum. A determination that appellant's claim is a compulsory counterclaim which must be pleaded in the district court of Washington cannot reasonably be expected to affect the merits of appellant's contract claim.[3] Moreover, the Supreme Court has emphasized the federal courts' overriding interest in applying their own

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[3]Nor, we might add, do we perceive any unfairness to Northwest Sports in applying the Federal Rules to the question before us. While the parties apparently expected the contract to be interpreted in accordance with the laws of British Columbia, it is not reasonable to assume that the parties expected Canadian law to be applied to the procedural question whether an action for breach of the contract would be a compulsory counterclaim in a pending antitrust suit in a United States district court. See Restatement (Second) of Conflicts of Laws § 122, Comment a (1971).

rules of procedure and has indicated that in federal court the Federal Rules of Civil Procedure will almost invariably be applied if there is a Federal Rule governing the point in dispute. See Hanna v. Plumer, 380 U.S. 460, 469-74, 85 S.Ct. 1136, 1142-46, 14 L.Ed.2d 8 (1965); see also TPO Inc. v. Federal Deposit Ins. Corp., 487 F.2d 131, 133-34 (3d Cir. 1973) (in a diversity action, Fed.R.Civ.P. 13(a) relating to compulsory counterclaims applies without reference to conflicting state rule); Tolson v. Hodge, 411 F.2d 123, 125-29 (4th Cir. 1969) (same).

[1] Northwest Sports nevertheless argues that Canadian law is controlling because (1) the parties designated Canadian law as the law to be applied to the contract (2) Canada is the jurisdiction with the most significant relationship to the transaction. However, as noted above, the controlling choice of law principle is that

a court's own local rules will be applied to determine how litigation shall be conducted. Appellants have failed to demonstrate why this principle is inapplicable in this case. Accordingly, we conclude that the district court properly looked to Fed.R.Civ.P. 13, and not Canadian law, to determine whether a defendant's contract claim must be pleaded as a compulsory counterclaim in the federal antitrust action pending before it.

II.

[2] Federal Rule of Civil Procedure 13(a) requires a defendant in federal court to state as a counterclaim any claim he may have against the plaintiff that "arises out of the transaction or occurrence that is the subject matter" of the plaintiff's

claim.[4] The purpose of requiring a defendant to assert his claim as a counterclaim in a pending action is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Southern Construction Co. v. Pickard, 371 U.S. 57, 60, 83 S.Ct. 108, 110, 9 L.Ed.2d 31 (1962). The Rule bars a party who failed to assert a compulsory counterclaim in one action from instituting a second action in which that counterclaim is the

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[4]Fed.R.Civ.P. 13(a) provides:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action...."

basis of the complaint. See Southern Construction Co. v. Pickard, 371 U.S. at 60, 83 S.Ct. at 110; Wright & Miller, Federal Practice and Procedure, Civil §§ 1417-1418 (1971). It is well-settled that in order to enforce this bar, a federal court may enjoin a party from bringing its compulsory counterclaim in a subsequent federal court action. See, e.g., Warshawski & Co. v. Arcata Nat. Corp., 552 F.2d 1257 (7th Cir. 1977); Columbia Plaza Corp. v. Security Nat. Bank, 525 F.2d 620 (D.C.Cir.1975); Scott & Fetzer Co. v. McCarty, 450 F.Supp. 274 (N.D. Ohio 1977). Northwest Sports maintains, however, that the district court abused its discretion by restraining Northwest Sports from proceeding in the courts of a foreign country in order to enforce the dictates of Rule 13(a) and avoid duplicative litigation. We disagree.

[3] A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be "used sparingly." Philp v. Macri, 261 F.2d 945, 947 (9th Cir. 1958). "The issue is not one of jurisdiction, but one . . . of comity." Canadian Filters Ltd. v. Lear Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969). See also Chase Manhattan Bank v. State of Iran, 484 F.Supp. 832, 836 (S.D.N.Y.1980)[5]

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[5]The Anti-Injunction Statute, 28 U.S.C. § 2283, removes from the federal courts the equitable power to grant injunctions to stay state court proceedings "except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments." Rule 13(a) has been held not to create an express statutory exception to the proscriptions of § 2283 and, accordingly, a federal court is barred by § 2283 from enjoining a party from proceeding in state court on a claim that should have been pleaded as a compulsory counterclaim in a prior federal suit. See e.g., Nolen v. Hammet Co., Inc., 56 F.R.D. 361, 362

In re Unterweser Reederei Gmbh, 428 F.2d 888 (5th Cir. 1970), aff'd on rehearing en banc, 446 F.2d 907 (1971), rev'd on other grounds sub nom. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), is instructive. In that case, a federal district judge enjoined Unterweser Reederei from proceeding in the High Court of Justice in London, England on a claim that had been pleaded as a counterclaim in an action already pending in federal district court. In affirming the district court's issuance of the injunction, the Fifth Circuit noted that

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(Footnote 5 continued)

(D.S.C.1972); see also 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1418 at 106. It should be emphasized, however, that Congress has not removed from the federal courts the power to enjoin parties subject to their jurisdiction from proceeding in the courts of a foreign country, leaving the decision to enjoin such actions squarely within the discretion of the district courts.

foreign litigation may be enjoined when it would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing courts in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations. It then went on to hold that "allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and 'tend to frustrate and delay the speedy and efficient determination of the cause.'" Id. at 896, quoting In re Unterweser Reederei, Gmbh, 296 F.Supp. 733, 735-36 (M.D.Fla. 1969).[6]

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[6] In re Unterweser Reederei, Gmbh, supra, arose as the result of a towing accident in which a drilling barge owned by the Zapata Off-Shore Company (Zapata) was damaged while being towed by a tug owned by Unterweser Reederei (Unterweser). Both Zapata and Unterweser brought suit in federal district court in Florida: Zapata, for damages to his barge, Unterweser, for an

Similarly, in Bethell v. Peace, 441 F.2d 495 (5th Cir. 1971), a federal

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(Footnote 6 continued)

exoneration and limitation of liability arising from the mishap and, by way of counterclaim, for moneys owed under the towage contract. Unterweser also brought an action under the contract in the High Court of Justice, which was subsequently enjoined by the district court, and the Fifth Circuit affirmed.

In Bremen v. Zapata Off-Shore Co., 407 U.S.1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), however, the Supreme Court reversed. The Court noted that the Zapata-Unterweser towage contract contained a clause providing that any dispute arising from the contract must be litigated in the High Court of Justice in London and concluded that in view of the forum-selection clause, the federal district court erred in not declining jurisdiction on the basis of the doctrine of forum non conveniens. The Court did not, therefore, reach the question of the propriety of issuing an injunction when the district court properly had jurisdiction prior to the filing of a foreign action and no forum selection clause existed. Cf. In re Unterweser Reederei, Gmbh, 428 F.2d 888, 896, 912 (5th Cir. 1970 Wisdom, J., dissenting) (contending that the district court action should have dismissed in view of the forum selection clause, but conceding that if the district court properly retained jurisdiction, the injunction refraining Unterweser from proceeding in the English courts was proper).

district court held that a land-sale contract executed in Florida between Florida residents involving land in the Bahamas was invalid, and issued an injunction restraining the defendant from prosecuting an action in the Bahamas to quiet title. The Fifth Circuit affirmed, holding that it was within the district court's discretion to enjoin the foreign suit where the action would relieve the moving party "of the expense and vexation of having to litigate in a foreign court." Id. at 498. See also Gage v. Riverside Trust Co., 86 F. 984 (C.C.S.D.Cal.1898) (defendants restrained from proceeding with an action in the courts of England on a claim raising issues already pending in federal court). Cf. Sperry Rand Corp. v. Sunbeam Corp., 285 F.2d 542 (7th Cir. 1960) (reversing order enjoining plaintiff from bringing foreign suit where disposition of the action in federal court would not dispose of the

issues raised in the foreign action and where there was no evidence that the foreign litigation was vexatious or harassing).

In the case before us, the validity of the 1972-74 agreements will be a central issue in both the Canadian and American litigations. Adjudicating this issue in two separate actions is likely to result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses. Moreover, separate adjudications could result in inconsistent rulings or even a race to judgment.

[4] In granting the injunction against Northwest Sports, the district court below noted that it had considered the relevant factors, including "the convenience to the parties and witnesses, the interest of the courts in promoting the efficient administration of justice, and

the potential prejudice to one party or the other," and concluded that the equitable balance weighs heavily in favor of plaintiffs, Abbey and Barnes. It also concluded that the policies animating Rule 13(a) and the rationale of the cases upholding injunctions against subsequently-filed federal court actions, applied with equal force to this case where the compulsory counterclaim was brought in the courts of Canada. In view of these policies and cases, we cannot say that the district court abused its discretion by enjoining Northwest Sports from prosecuting its contract claim in Canadian court.

AFFIRMED.

APPENDIX B

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FEB 9, 1979

JOE R. ROMANE, Clerk
By_____Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

SEATTLE TOTEMS HOCKEY CLUB, INC., ELDRED W. BARNES and VINCENT H. D. ABBEY, Plaintiffs, vs. THE NATIONAL HOCKEY LEAGUE, et al., Defendants.	NO. C75-804V ORDER ON DEFENDANTS' OBJECTIONS TO REPORT AND ORDER OF SPECIAL MASTER AND PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Having considered the objections of the Vancouver defendants to the report and order of the Special Master and the motion of plaintiffs for injunctive relief together with the memoranda and affidavits filed by counsel and having reviewed de novo the decision of the Special Master, the Court now finds and rules as follows:

1. Rule 13a of the Federal Rules of Civil Procedure is controlling with respect to a determination as to whether the claim of defendant Northwest Sports Enterprises, Ltd., against Vincent Abbey and Eldred Barnes filed in the Supreme Court of British Columbia on May 25, 1978 (No. C780518) constitutes a compulsory counterclaim to this action. Although the law of the Province of British Columbia may control the interpretation of the May, 1974 agreement, that law does not control the manner in which litigation is conducted in this forum. Restatement (Second) of Conflict of Laws § 122 (1971). The procedural rules of this forum are fully applicable to the action before this Court.

2. Under Rule 13a the claim of defendant Northwest Sports Enterprises, Ltd., against Vincent Abbey and Eldred Barnes, filed in the Supreme Court of British Columbia on May 25, 1978 (No.

C780518), is a compulsory counterclaim which, pursuant to Rule 13a, could and should have been brought in the instant action. See e.g., Warshawsky & Co. v. Arcata Nat. Corp., 552 F.2d 1257 (7th Cir. 1977). It is clear that the claims of the plaintiffs and those of Northwest Sports Enterprises, Ltd., arise out of the same "transaction or occurrence" within the meaning of Rule 13a, for Northwest Sports Enterprises, Ltd., is seeking in its action in British Columbia to recover upon the very contract which the plaintiffs are seeking in this action to have declared void.

3. Although the claim of Northwest Sports Enterprises, Ltd., was filed in the Supreme Court of British Columbia more than two years after the filing of the instant action by plaintiffs, a decision as to whether to enjoin further prosecution of that claim should be based upon a full

consideration of all relevant equitable factors and not simply upon a mechanical invocation of the rule that the subsequently-filed law suit should be enjoined. See Warshawsky & Co., supra; Columbia Plaza Corp. v. Security Nat. Bank, 525 F.2d 620 (D.C. Cir. 1975).

4. After considering all relevant equitable factors, including, but not being limited to, the convenience of parties and witnesses, the interest of the courts in promoting the efficient administration of justice, and the potential prejudice to one party or the other, the Court finds that the equitable balance weighs heavily in favor of the plaintiffs. Even though the compulsory counterclaim in this case was brought in a foreign court, the rationale of the cases cited above force this Court to conclude that the controversies between these parties should be resolved in a single forum and at one time. See Bethell

v. Peace, 441 F.2d 495 at 498 (5th Cir. 1971). Further prosecution of the action of defendant Northwest Sports Enterprises, Ltd., against Vincent Abbey and Eldred Barnes in the Supreme Court of British Columbia must in consequence be enjoined.

Accordingly, the objections of the Vancouver defendants to the report and order of the Special Master are DENIED and the motion of plaintiffs for injunctive relief is GRANTED. Defendant Northwest Sports Enterprises, Ltd., is hereby ENJOINED from further prosecution of the suit entitled Northwest Sports Enterprises, Ltd., vs. Vincent Abbey and Eldred Barnes, No. C780518 (British Columbia Supreme Court), filed May 25, 1978).

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record and to the Special Master Richard F. Broz.

DATED this 8th day of February, 1979.

/s/ Donald S. Voorhees
United States District Judge

Opposition

Office - Supreme Court, U.S.
FILED
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NO. 81-738

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NORTHWEST SPORTS ENTERPRISES, LTD.,
a corporation,
Petitioner,

v.

SEATTLE TOTEMS HOCKEY CLUB, INC.,
ELDRED W. BARNES and VINCENT H. E. ABBEY,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 13, 1981

ABCD AT CRAFTSMAN PRESS, SEATTLE

QUESTION PRESENTED FOR REVIEW

Whether Judge Voorhees, District Court Judge, acted within his discretionary power when enjoining a contract claim in Canadian courts, and determining that it was a compulsory counterclaim under 1 Federal Rules of Civil Procedure Rule 13(a), 28 U.S.C.A.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NORTHWEST SPORTS ENTERPRISES, LTD.,
a corporation,
Petitioner,

v.

SEATTLE TOTEMS HOCKEY CLUB, INC.,
ELDRED W. BARNES and VINCENT H. E. ABBEY,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A.

RESUME OF PROCEEDINGS

The respondents accept the resume of proceedings set forth in the Opinion of the Ninth Circuit of the United States Court of Appeals, which is attached as Appendix A and is incorporated by this reference.

B.

STATEMENT OF JURISDICTION

The petitioner is appealing the decision of the Honorable Donald S. Voorhees, Judge of the District Court of Washington of February 8, 1979, which is attached as Appendix B and is incorporated by this reference. The Ninth Circuit of the United States Court of Appeals affirmed Judge Voorhees' ruling on August 3, 1981.

C.

STATEMENT OF THE CASE

Nature of Respondents' Case

Petitioner Northwest Sports Enterprises, Ltd., a defendant in pending anti-trust litigation in the United States District Court for Western Washington, has been enjoined by order of the Honorable Donald S. Voorhees from proceeding with litigation against respondents Eldred W.

Barnes and Vincent H. D. Abbey in an action in the province of British Columbia.

After twenty-six months of delaying tactics in the pending anti-trust litigation, defendant Northwest Sports Enterprises, Ltd., when forced to answer to the allegations of respondents' complaint, filed suit against plaintiffs Barnes and Abbey in British Columbia for specific performance of a contract. The contract is attached to respondents' complaint in the anti-trust action pending and its legality is a specific issue in the pending anti-trust action.

Upon respondents' motion for extraordinary relief, the court granted injunctive relief against the petitioner Northwest Sports Enterprises, Ltd.

The Parties and the Pending Anti-Trust Litigation

The Seattle Totems Hockey Club, Inc., together with Barnes and Abbey filed the

pending anti-trust suit on November 17, 1975, against the petitioner Northwest Sports Enterprises, Ltd., two of its corporate officers, the National Hockey League, fifteen other member clubs, and three of the National Hockey League officers.

The litigation was brought by respondents under the Sherman and Clayton Acts for the destruction and damage of respondents' business in operating the Seattle professional ice hockey team in the Western Hockey League. Respondents claim that defendants, including petitioner Northwest Sports Enterprises, Ltd., destroyed respondent Seattle Totems; dissolved the Western Hockey League; damaged the respondents in their business by the petitioner's abuse of the monopoly power they held in the industry of professional ice hockey.

Petitioner Northwest Sports Enterprises, Ltd., is a holding company of

Vancouver Hockey Club, Ltd., which owns and operates a National Hockey League franchised professional hockey team in Vancouver, British Columbia.

The NHL is the National Hockey League, which is also a defendant in this pending anti-trust action. It is an unincorporated association with its principal office in Montreal, Quebec, Canada. It is operated and controlled by a Board of Governors which consists of one owner-representative from each member team.

Eldred W. Barnes and Vincent H. D. Abbey are individual stockholders of the Seattle Totems Hockey Club, Inc. During the relevant period, respondents Barnes and Abbey owned approximately 45% of the common stock of the Seattle Totems. The remaining common stock was owned by petitioner Northwest Sports Enterprises, Ltd.

Inclusive within the plaintiffs' complaint was the prayer to declare the

contracts involved between the parties in the delayed and restrained British Columbia litigation void ab initio as violative of the Sherman and Clayton Acts.

Petitioner's Ancillary Litigation - The British Columbia Case

On January 26, 1978, petitioner filed a Writ of Summons in the Supreme Court of British Columbia under Cause No. C780518. Respondents Barnes and Abbey, after being served in the United States, appeared in the British Columbia proceedings by notice of appearance by their Canadian attorneys. Exactly one day after receipt of respondents' notice of appearance, petitioner Northwest Sports Enterprises, Ltd., filed a ten-day motion for summary judgment for the sum of $2,727,789.88, based upon their writ of summons and affidavits. The British Columbia court denied the motion.

Petitioner's claim in British Columbia is based upon the contract of May 1974,

which contract is designated as "Appendage to Complaint, Exhibit '2'", CR 9 of petitioner's complaint in the pending United States District Court action. The sum of $2,727,789.88 represents the funds that petitioner Northwest Sports Enterprises, Ltd., claims to have invested into respondent Seattle Totems Hockey Club, Inc., while Northwest Sports Enterprises, Ltd. operated the Seattle Totems during the years 1972, 1973, 1974 and 1975 as petitioner's developmental (farm) team in the Western Hockey League.

Petitioner Northwest Sports Enterprises, Ltd. originally entered into an agreement with respondents in April 1972, wherein it purchased the controlling (55%) interest in the Seattle Totems Hockey Club, Inc., and the right of exclusive management and control of the Seattle Totems Hockey Club. The Seattle Totems owned and operated a professional hockey franchise in the

Western Hockey League. Northwest Sports' acquisition and control over the Seattle Totems was for the purpose of developing young professional players for the Vancouver National Hockey League team.

It must be noted that contrary to contention in the Ninth Circuit, all of the $2,727,789.88 claimed to be owing are funds that were spent by respondent Washington State corporation, the Seattle Totems Hockey Club, Inc., in the United States, as a professional ice hockey team that played all scheduled league games in the following United States cities: Seattle, Portland, San Diego, Phoenix, Salt Lake City, Denver, Omaha, Tulsa, Dallas and Fort Worth.

D.

ARGUMENT FOR DENIAL OF WRIT

Petitioner, having placed itself properly before the Washington District

Court by its ownership, management, and control of the Seattle Totems Hockey Club, Inc., a Washington corporation, was "shopping for a forum" to delay and obfuscate the issues alleged in respondents' complaint. The filing of the writ of summons and complaint by petitioner in British Columbia twenty-six months after the commencement of this anti-trust action, frustrates the purpose of Rules 1[1] and 13(a)[2] of the Federal Rules of Civil

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[1] Rule 1. Scope of Rules. These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. As amended Dec. 29, 1948, effective Oct. 20, 1949.

[2] Rule 13(a). Counterclaim and Cross-Claim. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of

Procedure. The purpose of these rules is to obviate a multiplicity of suits and to provide economy, efficiency, and convenience in judicial procedure. Robinson Bros. & Co. v. Tygard Steel Products Co., 9 F.R.D. 468 (D.C. Pa. 1949); Union Nat. Bank of Youngstown, Ohio v. Superior Steel Corp., 9 F.R.D. 128 (D.C. Pa. 1949). See also Bach v. Friden Calculating Mach. Co., 148 F.2d 407 (C.C.A. Ohio 1945); Warnick v. Bethlehem-Fairfield Shipyard, 68 F. Supp. 857 (D.C. Md. 1946); Madison v. Cobb, 29 F. Supp. 881 (D.C. Pa. 1939); E. I. DuPont DeNemours & Co. v. DuPont Textile Mills, 26 F. Supp. 236 (D.C. Pa. 1939); Container Co. v. Carpenter

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(Footnote 2 continued)

whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. As amended Dec. 27, 1946, effective date March 19, 1948.

Container Corp., 9 F.R.D. 89 (D.C. Del. 1949); Best Foods v. General Mills, 3 F.R.D. 459 (D.C. Del. 1944), modified on other grounds, 59 F. Supp. 201; Pearson v. O'Connor, 2 F.R.D. 521 (D.C.D.C. 1942); Hessian Hills Corporation v. Union Cent. Life Ins. Co., 1 F.R.D. 743 (D.C.N.Y. 1941); Keasbey & Mattison Co. v. Rothensies, 1 F.R.D. 626 (D.C. Pa. 1941); Anderson v. Brad/, 1 F.R.D. 589 (D.C. Ky. 1941); Michels v. Ripley, 1 F.R.D. 332 (D.C.N.Y. 1939); Jacobson v. F. W. Stock & Sons, 1 F.R.D. 138 (D.C.N.Y. 1940); McPherrin v. Hartford Fire Ins. Co., 1 F.R.D. 88 (D.C. Neb. 1940).

Rule 13(a) is intended to achieve resolution in a single lawsuit of all disputes arising out of common matters. It is particularly directed against one who fails to assert a counterclaim in one action and then institutes a second action in which that counterclaim becomes the

basis of the complaint. Southern Construction Co. v. Pickard, 371 U.S. 57, 60, 83 S. Ct. 108, 110, 9 L. Ed. 2d 31 (1962). The above principles have been reaffirmed by the United States Court of Appeals, Ninth Circuit in the case from which petitioner is appealing (see Appendix A).

The determination that a counterclaim is compulsory under Rule 13(a) and as such should be pleaded in the court of original claim is a procedural rather than substantive matter.

The controlling choice of law principle as found by the Ninth Circuit (Appendix A) is that a court will apply its own local rules to determine how litigation will be conducted. The Supreme Court has held upon numerous occasions that a federal court will apply the Federal Rules of Civil Procedure if there is a federal rule governing the point in dispute. See Hanna v. Plumer, 380 U.S. 460, 469-74, 85 S. Ct.

1136, 1142-46, 14 L. Ed. 2d 8 (1965); TPO, Inc. v. Federal Deposit Ins. Corp., 487 F.2d 131, 133-34, (3d Cir. 1973); Tobson v. Hodge, 411 F.2d 123, 125-129 (4th Cir. 1969).

Petitioner has raised the issue of comity as a basis for restraint by American courts in enjoining corporations from suing in a foreign country actions brought in personam. In support for this argument, petitioner cites the decisions in Kline v. Burke Construction Co., 260 U.S. 226 (1922) and Donovan v. City of Dallas, 377 U.S. 408 (1964), and Princess Lida v. Thompson, 305 U.S. 456, 466, 59 S. Ct. 275, 83 L. Ed. 285 (1939).

These cases do not advance the argument of petitioner for two reasons.

First, the cases do not take into account the more recent case, In re Unterweiser Reedorei GMBH, 428 F.2d 888 (5th Cir. 1970), aff'd on rehearing en banc, 446

F.2d 907 (1971), rev'd on other grounds sub nom. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) discussed at length by the Court of Appeals, Ninth Circuit (see Appendix A). The case held that a foreign suit may be enjoined when it would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing courts in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations.

Second, and more important, is that the key question in the present case is not one of law, but of the court's discretionary power. The Court of Appeals, Ninth Circuit, held that the district court did not abuse its discretion by enjoining Northwest Sports from prosecuting its contract claim in the Canadian court. This discretion is based on the aforementioned

principle that a court has the power to apply its local rules to determine how litigation will be conducted.

The court recognized that its discretionary power should be used sparingly when enjoining parties from proceeding in a foreign country; but in that instance the issue is not one of jurisdiction (a legal question), but one of comity (a discretionary question). Philip v. Macri, 261 F.2d 945, 947 (9th Cir. 1958). Canadian Filters, Ltd. v. Lear Spiegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969). Petitioner has cited Canadian Filters, Ltd. v. Lear Spiegler, Inc., supra, as authority for the right of a defendant to litigate its rights to damages under Canadian patent law although there was a case on patent infringement in American courts. Respondents submit that apart from the difference in the fact patterns, it was within the United States court's discretionary power to allow

the patent case to be litigated in Canadian courts. The court decided that the success of the defendant's business depended on two patent laws, one American and one Canadian, and under these circumstances, it would not enjoin the Canadian litigation.

The Court of Appeals, Ninth Circuit, having cited Canadian Filters, Ltd. v. Lear Siegler, supra, as an authority for comity, went on to discuss comity in the context of the In re Unterweiser Reedorei GMBH decision quoted above. The four elements noted by the Fifth Circuit in that case form the discretionary guidelines adopted by federal courts in determining whether to enjoin foreign litigation. In applying the guidelines to the present case, the Ninth Circuit stated:

> In the case before us, the validity of the 1972-74 agreements will be a central issue in both the Canadian and American litigations. Adjudicating this issue in two separate actions is likely to result in unnecessary delay and substantial

> inconvenience and expense to the parties and witnesses. Moreover, separate adjudications could result in inconsistent rulings or even a race to judgment.

(see Appendix A, page A-19).

Petitioner has quoted Sperry Rand Corp. v. Sunbeam Corp., 285 F.2d 542 (7th Cir. 1960) to support the argument that a party should not be enjoined from bringing a foreign suit where the disposition of the action in federal court would not dispose of the issues raised in the foreign action. Respondents submit that the Court of Appeals, Ninth Circuit, in proper exercise of its discretionary power has adequately dealt with this question as evidenced in the court's statement quoted above.

Petitioner has also argued that the decision below conflicts with the decision of the Third Circuit in Compagnie des Bauxites de Guinea v. The Insurance Company of Ireland, 651 F.2d 877 (1981), No. 80-2416 (3d Cir. June 10, 1981),

petition for cert. filed, 50 USLW 3231 (U.S. August 12, 1978). The Third Circuit reversed a district court judgment issuing an injunction against proceedings brought by defendants therein in the courts of England. This reversal, however, was only a minor issue in the decision. The main issue pertained to discovery for which the petition for writ of certiorari is pending, and is irrelevant to the issue of the district court's discretionary power to require a compulsory counterclaim in the present case. Respondents submit that petitioner has pleaded in bad faith for not reporting accurately the decision of the Compagnie des Bauxites de Guinea v. The Insurance Company of Ireland, supra, and the reason for the writ of certiorari as well as failing to include the reported case citation in their petition.

Even as the Compagnie des Bauxites de Guinea v. The Insurance Company of Ireland,

supra, case relates to minor issues of injunction of foreign proceedings, the court stated:

> We do not determine that the district court lacks the power to enjoin parties from pursuing an action in another jurisdiction in every case. It is sufficient here to hold that the district court abused its discretion when it enjoined an action seeking a declaratory judgment in the courts of another sovereign. In the present case, duplication of issues and insurers' delay in filing the London action were sole basis for the court's injunction, and we hold that these factors alone did not justify the breach of comity among the courts of separate sovereignties.

This statement underlines the principle that the power to enjoin parties from proceeding in another jurisdiction is discretionary and must be decided on a case-by-case basis. The present case involves actions by petitioner which are far more harassing and vexatious than those in Compagnie des Bauxites de Guinea v. The Insurance Company of Ireland, supra. As stated in the facts of the case (see

Statement of the Case), petitioner not only failed to respond to respondents' interrogatories for twenty-six months until it finally filed its own suit, but one day after receiving notice of respondents' appearance, filed a ten-day motion for summary judgment for $2,727,789.88, based on their writ of summons and affidavits. It is doubtful that one could find a clearer case of harassment.

E.

SUMMARY

In summary, respondents submit that Judge Voorhees acted within his discretionary power in ruling that petitioner's claim is a compulsory counterclaim under Federal Civil Rule Practice 13(a). The question is

one of procedure for which a court is empowered to look to its local rules to determine how the litigation will be conducted.

Respectfully submitted,

FERGUSON & BURDELL
By: THOMAS J. GREENAN
Counsel of Record
for Respondents

Appendix

APPENDIX A

SEATTLE TOTEMS HOCKEY CLUB, INC.,
ELDRED W. BARNES
and VINCENT H.D. ABBEY,
Plaintiffs-Appellees,

v.

THE NATIONAL HOCKEY LEAGUE, et al.,
Defendants,

NORTHWEST SPORTS ENTERPRISES, LTD.,
Defendant-Appellant.

No. 79-4209.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued and Submitted Jan. 7, 1981.
Decided Aug. 3, 1981.

Owners of Seattle hockey team brought antitrust action against the National Hockey League, owners of Vancouver team in the NHL, and others charging defendants with unlawful monopolization and seeking, among other relief, to have certain agreements between them and owners of the Vancouver team declared void and unenforceable. Subsequently, owners of the Vancouver team brought action against plaintiffs in Canadian court for damages for

breach of same agreements that were being challenged as illegal and unenforceable in plaintiffs' antitrust action. The United States District Court for the Western District of Washington, Donald S. Voorhees, District Judge, granted plaintiffs' motion to enjoin owner of the Vancouver team from prosecuting its contract claim in Canada, and defendant appealed. The Court of Appeals, Norris, Circuit Judge, held that: (1) District Court properly looked to Federal Rules of Civil Procedure, and not Canadian law, to determine whether defendant's contract claim was to be pleaded as a compulsory counterclaim in the federal antitrust action pending before it, and (2) District Court did not abuse its discretion by enjoining defendant from prosecuting its contract claim in Canadian court.

Affirmed.

1. Federal Civil Procedure -- 775

District court properly looked to Federal Rules of Civil Procedure, and not Canadian law, to determine whether Canadian defendant's contract claim was to be pleaded as a compulsory counterclaim in federal antitrust action pending before it, notwithstanding language in the contract that the agreement was to be interpreted in accordance with Canadian law. Fed.Rules Civ.Proc. Rule 13(a), 28 U.S.C.A.

2. Federal Civil Procedure -- 775
Federal Courts -- 1149

Federal rule requiring a defendant in federal court to state as a counterclaim any claim he may have against plaintiff that "arises out of the transaction or occurrence that is the subject matter" of plaintiff's claim bars a party who failed to assert a compulsory counterclaim in one action from instituting a second action in which that counterclaim is basis of the

complaint and, in order to enforce this bar, a federal court may enjoin a party from bringing its compulsory counterclaim in a subsequent federal court action. Fed. Rules Civ.Proc. Rule 13(a), 28 U.S.C.A.

3. Courts -- 516

A federal district court with jurisdiction over the parties has power to enjoin them from proceeding with an action in courts of a foreign country, although the power should be used sparingly.

4. Courts -- 516

District court did not abuse its discretion by enjoining Canadian defendant in antitrust case pending before it from prosecuting, in Canadian court, its contract claim involving same agreements that were being challenged as illegal and unenforceable in the antitrust action. Fed.Rules Civ.Proc. Rule 13(a), 28 U.S.C.A.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, POOLE, and NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

This appeal arises out of a private antitrust action brought in federal district court by appellees Vincent Abbey and Eldred Barnes, owners of the Seattle Totems, an ice hockey team in the now-defunct Western Hockey League. Named as defendants were the National Hockey League (NHL), Northwest Sports, owners of the Vancouver Canucks of the NHL, and various League officers and club owners. The suit charges defendants with unlawful monopolization of the ice hockey industry in North America and seeks, among other relief, to have certain agreements between Abbey and Barnes and Northwest Sports relating to the

sale and management of the Seattle Totems declared void and unenforceable.[1]

Approximately twenty-seven months after the filing of the antitrust action, Northwest Sports sued Abbey and Barnes in British Columbia Supreme Court for damages for breach of the same agreements that are being challenged as illegal and unenforceable in the appellees' antitrust action in federal district court. Abbey and Barnes then moved in the federal court action to enjoin Northwest Sports from prosecuting its contract claim in British Columbia on

---

[1]The agreements called for Abbey and Barnes to sell to Northwest Sports 55% of the Totems and to pay Northwest Sports 44.44% of all moneys expended by Northwest Sports in the operation of the Totems franchise. The agreements also called for Abbey and Barnes to repurchase all the shares held by Northwest Sports in the Totems if the NHL granted the Totems an NHL franchise.

The agreements were executed in Vancouver, and paragraph 18 of the agreement which Abbey and Barnes allegedly breached provided that "[t]his agreement shall be interpreted in accordance with the laws of the Province of British Columbia."

the ground that the claim constitutes a compulsory counterclaim to plaintiffs' antitrust complaint and must be pleaded in the pending federal antitrust action in Washington. The district court granted plaintiffs' motion and issued the injunction against prosecution of the Canadian suit. Northwest Sports appeals pursuant to 28 U.S.C. § 1292(a)(1).

I.

Northwest Sports does not deny that under Federal Rule of Civil Procedure 13(a) its contract claim would constitute a compulsory counterclaim in the pending antitrust action. Rather, it contends that Canadian law, and not Rule 13(a), governs the determination whether the contract claim is compulsory and that Canadian law would not require Northwest Sports to plead its claim as a compulsory counterclaim in the pending antitrust suit. In concluding that Rule 13(a) governs, the district court

below relied on the general choice of law principle, restated in § 122 of the Restatement (Second) of Conflict of Laws (1971), that a court will apply its own rules of procedure to regulate the conduct of litigation before it.[2] See also Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2nd Cir. 1955). Northwest Sports argues, however, that this general rule is inapplicable because the issue in question is "one whose resolution would be likely to affect the ultimate result of the case." Restatement (Second) of Conflict of Laws § 122, Comment a (1971). We find this argument without merit.

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[2]Restatement (Second) of Conflict of Laws § 122 (1971) states:

> A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.

The issue before this court is not whether Canadian law governs the interpretation or the validity of the agreements between Northwest Sports and appellees, but rather whether all claims arising out of these agreements should be heard in a single forum. A determination that appellant's claim is a compulsory counterclaim which must be pleaded in the district court of Washington cannot reasonably be expected to affect the merits of appellant's contract claim.[3] Moreover, the Supreme Court has emphasized the federal courts' overriding interest in applying their own

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[3]Nor, we might add, do we perceive any unfairness to Northwest Sports in applying the Federal Rules to the question before us. While the parties apparently expected the contract to be interpreted in accordance with the laws of British Columbia, it is not reasonable to assume that the parties expected Canadian law to be applied to the procedural question whether an action for breach of the contract would be a compulsory counterclaim in a pending antitrust suit in a United States district court. See Restatement (Second) of Conflicts of Laws § 122, Comment a (1971).

rules of procedure and has indicated that in federal court the Federal Rules of Civil Procedure will almost invariably be applied if there is a Federal Rule governing the point in dispute. See Hanna v. Plumer, 380 U.S. 460, 469-74, 85 S.Ct. 1136, 1142-46, 14 L.Ed.2d 8 (1965); see also TPO Inc. v. Federal Deposit Ins. Corp., 487 F.2d 131, 133-34 (3d Cir. 1973) (in a diversity action, Fed.R.Civ.P. 13(a) relating to compulsory counterclaims applies without reference to conflicting state rule); Tolson v. Hodge, 411 F.2d 123, 125-29 (4th Cir. 1969) (same).

[1] Northwest Sports nevertheless argues that Canadian law is controlling because (1) the parties designated Canadian law as the law to be applied to the contract (2) Canada is the jurisdiction with the most significant relationship to the transaction. However, as noted above, the controlling choice of law principle is that

a court's own local rules will be applied to determine how litigation shall be conducted. Appellants have failed to demonstrate why this principle is inapplicable in this case. Accordingly, we conclude that the district court properly looked to Fed.R.Civ.P. 13, and not Canadian law, to determine whether a defendant's contract claim must be pleaded as a compulsory counterclaim in the federal antitrust action pending before it.

II.

[2] Federal Rule of Civil Procedure 13(a) requires a defendant in federal court to state as a counterclaim any claim he may have against the plaintiff that "arises out of the transaction or occurrence that is the subject matter" of the plaintiff's

claim.[4] The purpose of requiring a defendant to assert his claim as a counterclaim in a pending action is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Southern Construction Co. v. Pickard, 371 U.S. 57, 60, 83 S.Ct. 108, 110, 9 L.Ed.2d 31 (1962). The Rule bars a party who failed to assert a compulsory counterclaim in one action from instituting a second action in which that counterclaim is the

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[4]Fed.R.Civ.P. 13(a) provides:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action...."

basis of the complaint. See Southern Construction Co. v. Pickard, 371 U.S. at 60, 83 S.Ct. at 110; Wright & Miller, Federal Practice and Procedure, Civil §§ 1417-1418 (1971). It is well-settled that in order to enforce this bar, a federal court may enjoin a party from bringing its compulsory counterclaim in a subsequent federal court action. See, e.g., Warshawski & Co. v. Arcata Nat. Corp., 552 F.2d 1257 (7th Cir. 1977); Columbia Plaza Corp. v. Security Nat. Bank, 525 F.2d 620 (D.C.Cir.1975); Scott & Fetzer Co. v. McCarty, 450 F.Supp. 274 (N.D. Ohio 1977). Northwest Sports maintains, however, that the district court abused its discretion by restraining Northwest Sports from proceeding in the courts of a foreign country in order to enforce the dictates of Rule 13(a) and avoid duplicative litigation. We disagree.

[3] A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be "used sparingly." Philp v. Macri, 261 F.2d 945, 947 (9th Cir. 1958). "The issue is not one of jurisdiction, but one . . . of comity." Canadian Filters Ltd. v. Lear Siegler, Inc., 412 F.2d 577, 578 (1st Cir. 1969). See also Chase Manhattan Bank v. State of Iran, 484 F.Supp. 832, 836 (S.D.N.Y.1980)[5]

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[5]The Anti-Injunction Statute, 28 U.S.C. § 2283, removes from the federal courts the equitable power to grant injunctions to stay state court proceedings "except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments." Rule 13(a) has been held not to create an express statutory exception to the proscriptions of § 2283 and, accordingly, a federal court is barred by § 2283 from enjoining a party from proceeding in state court on a claim that should have been pleaded as a compulsory counterclaim in a prior federal suit. See e.g., Nolen v. Hammet Co., Inc., 56 F.R.D. 361, 362

In re Unterweser Reederei Gmbh, 428 F.2d 888 (5th Cir. 1970), aff'd on rehearing en banc, 446 F.2d 907 (1971), rev'd on other grounds sub nom. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), is instructive. In that case, a federal district judge enjoined Unterweser Reederei from proceeding in the High Court of Justice in London, England on a claim that had been pleaded as a counterclaim in an action already pending in federal district court. In affirming the district court's issuance of the injunction, the Fifth Circuit noted that

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(Footnote 5 continued)

(D.S.C.1972); see also 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1418 at 106. It should be emphasized, however, that Congress has not removed from the federal courts the power to enjoin parties subject to their jurisdiction from proceeding in the courts of a foreign country, leaving the decision to enjoin such actions squarely within the discretion of the district courts.

foreign litigation may be enjoined when it would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing courts in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations. It then went on to hold that "allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship' and 'tend to frustrate and delay the speedy and efficient determination of the cause.'" Id. at 896, quoting In re Unterweser Reederei, Gmbh, 296 F.Supp. 733, 735-36 (M.D.Fla. 1969).[6]

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[6] In re Unterweser Reederei, Gmbh, supra, arose as the result of a towing accident in which a drilling barge owned by the Zapata Off-Shore Company (Zapata) was damaged while being towed by a tug owned by Unterweser Reederei (Unterweser). Both Zapata and Unterweser brought suit in federal district court in Florida: Zapata, for damages to his barge, Unterweser, for an

Similarly, in Bethell v. Peace, 441 F.2d 495 (5th Cir. 1971), a federal

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(Footnote 6 continued)

exoneration and limitation of liability arising from the mishap and, by way of counterclaim, for moneys owed under the towage contract. Unterweser also brought an action under the contract in the High Court of Justice, which was subsequently enjoined by the district court, and the Fifth Circuit affirmed.

In Bremen v. Zapata Off-Shore Co., 407 U.S.1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), however, the Supreme Court reversed. The Court noted that the Zapata-Unterweser towage contract contained a clause providing that any dispute arising from the contract must be litigated in the High Court of Justice in London and concluded that in view of the forum-selection clause, the federal district court erred in not declining jurisdiction on the basis of the doctrine of forum non conveniens. The Court did not, therefore, reach the question of the propriety of issuing an injunction when the district court properly had jurisdiction prior to the filing of a foreign action and no forum selection clause existed. Cf. In re Unterweser Reederei, Gmbh, 428 F.2d 888, 896, 912 (5th Cir. 1970 Wisdom, J., dissenting) (contending that the district court action should have dismissed in view of the forum selection clause, but conceding that if the district court properly retained jurisdiction, the injunction refraining Unterweser from proceeding in the English courts was proper).

district court held that a land-sale contract executed in Florida between Florida residents involving land in the Bahamas was invalid, and issued an injunction restraining the defendant from prosecuting an action in the Bahamas to quiet title. The Fifth Circuit affirmed, holding that it was within the district court's discretion to enjoin the foreign suit where the action would relieve the moving party "of the expense and vexation of having to litigate in a foreign court." Id. at 498. See also Gage v. Riverside Trust Co., 86 F. 984 (C.C.S.D.Cal.1898) (defendants restrained from proceeding with an action in the courts of England on a claim raising issues already pending in federal court). Cf. Sperry Rand Corp. v. Sunbeam Corp., 285 F.2d 542 (7th Cir. 1960) (reversing order enjoining plaintiff from bringing foreign suit where disposition of the action in federal court would not dispose of the

issues raised in the foreign action and where there was no evidence that the foreign litigation was vexatious or harassing).

In the case before us, the validity of the 1972-74 agreements will be a central issue in both the Canadian and American litigations. Adjudicating this issue in two separate actions is likely to result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses. Moreover, separate adjudications could result in inconsistent rulings or even a race to judgment.

[4] In granting the injunction against Northwest Sports, the district court below noted that it had considered the relevant factors, including "the convenience to the parties and witnesses, the interest of the courts in promoting the efficient administration of justice, and

the potential prejudice to one party or the other," and concluded that the equitable balance weighs heavily in favor of plaintiffs, Abbey and Barnes. It also concluded that the policies animating Rule 13(a) and the rationale of the cases upholding injunctions against subsequently-filed federal court actions, applied with equal force to this case where the compulsory counterclaim was brought in the courts of Canada. In view of these policies and cases, we cannot say that the district court abused its discretion by enjoining Northwest Sports from prosecuting its contract claim in Canadian court.

AFFIRMED.

APPENDIX B

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FEB 9, 1979

JOE R. ROMANE, Clerk
By_____Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

SEATTLE TOTEMS HOCKEY CLUB, INC., ELDRED W. BARNES and VINCENT H. D. ABBEY, Plaintiffs, vs. THE NATIONAL HOCKEY LEAGUE, et al., Defendants.	NO. C75-804V ORDER ON DEFENDANTS' OBJECTIONS TO REPORT AND ORDER OF SPECIAL MASTER AND PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Having considered the objections of the Vancouver defendants to the report and order of the Special Master and the motion of plaintiffs for injunctive relief together with the memoranda and affidavits filed by counsel and having reviewed de novo the decision of the Special Master, the Court now finds and rules as follows:

1. Rule 13a of the Federal Rules of Civil Procedure is controlling with respect to a determination as to whether the claim of defendant Northwest Sports Enterprises, Ltd., against Vincent Abbey and Eldred Barnes filed in the Supreme Court of British Columbia on May 25, 1978 (No. C780518) constitutes a compulsory counterclaim to this action. Although the law of the Province of British Columbia may control the interpretation of the May, 1974 agreement, that law does not control the manner in which litigation is conducted in this forum. Restatement (Second) of Conflict of Laws § 122 (1971). The procedural rules of this forum are fully applicable to the action before this Court.

2. Under Rule 13a the claim of defendant Northwest Sports Enterprises, Ltd., against Vincent Abbey and Eldred Barnes, filed in the Supreme Court of British Columbia on May 25, 1978 (No.

C780518), is a compulsory counterclaim which, pursuant to Rule 13a, could and should have been brought in the instant action. See e.g., Warshawsky & Co. v. Arcata Nat. Corp., 552 F.2d 1257 (7th Cir. 1977). It is clear that the claims of the plaintiffs and those of Northwest Sports Enterprises, Ltd., arise out of the same "transaction or occurrence" within the meaning of Rule 13a, for Northwest Sports Enterprises, Ltd., is seeking in its action in British Columbia to recover upon the very contract which the plaintiffs are seeking in this action to have declared void.

3. Although the claim of Northwest Sports Enterprises, Ltd., was filed in the Supreme Court of British Columbia more than two years after the filing of the instant action by plaintiffs, a decision as to whether to enjoin further prosecution of that claim should be based upon a full

consideration of all relevant equitable factors and not simply upon a mechanical invocation of the rule that the subsequently-filed law suit should be enjoined. See Warshawsky & Co., supra; Columbia Plaza Corp. v. Security Nat. Bank, 525 F.2d 620 (D.C. Cir. 1975).

4. After considering all relevant equitable factors, including, but not being limited to, the convenience of parties and witnesses, the interest of the courts in promoting the efficient administration of justice, and the potential prejudice to one party or the other, the Court finds that the equitable balance weighs heavily in favor of the plaintiffs. Even though the compulsory counterclaim in this case was brought in a foreign court, the rationale of the cases cited above force this Court to conclude that the controversies between these parties should be resolved in a single forum and at one time. See Bethell

v. Peace, 441 F.2d 495 at 498 (5th Cir. 1971). Further prosecution of the action of defendant Northwest Sports Enterprises, Ltd., against Vincent Abbey and Eldred Barnes in the Supreme Court of British Columbia must in consequence be enjoined.

Accordingly, the objections of the Vancouver defendants to the report and order of the Special Master are DENIED and the motion of plaintiffs for injunctive relief is GRANTED. Defendant Northwest Sports Enterprises, Ltd., is hereby ENJOINED from further prosecution of the suit entitled Northwest Sports Enterprises, Ltd., vs. Vincent Abbey and Eldred Barnes, No. C780518 (British Columbia Supreme Court), filed May 25, 1978).

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record and to the Special Master Richard F. Broz.

DATED this 8th day of February, 1979.

/s/ Donald S. Voorhees
United States District Judge

Petitioner's Reply Brief

No. 81-738

Office - Supreme Court, U.S.
FILED
NOV 30 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

NORTHWEST SPORTS ENTERPRISES, LTD.,
a corporation,
Petitioner,

v.

SEATTLE TOTEMS HOCKEY CLUB, INC.;
ELDRED W. BARNES and VINCENT H.D. ABBEY,
Respondents.

PETITION ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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November 25, 1981

REPLY TO BRIEF OF RESPONDENTS

1. The Relevance of *Compagnie Des Bauxites de Guinea v. The Insurance Company of Ireland, et al.*, (U.S. No. 81-290).

In its original brief, petitioner pointed out that the decision of the Ninth Circuit in this case conflicts directly with the decision of the Third Circuit in *Compagnie des Bauxites de Guinea v. The Insurance Company of Ireland, et al.*, 651 F.2d 877 (3d Cir. June 10, 1981), *petition for cert. filed*, 50 U.S.L.W. 3132 (U.S. August 12, 1981) (No. 81-290), for which a Petition for a Writ of Certiorari is now pending before this Court. In their opposing brief, respondents make no attempt to distinguish the facts or discuss the reasons for the decision in the Third Circuit case; rather, at page 18 of their brief, they state that "petitioner has pleaded in bad faith for not reporting accurately the decision of the [Third Circuit] and the reason for the writ of certiorari... ." Respondents apparently believe that the question of comity was not raised in that petition.

Respondents' charge of bad faith was both irresponsible and inexcusable in light of the fact that an accurate summary of the issues presented in the Petition for a Writ of Certiorari to the Third Circuit was reported at 50 U.S.L.W. 3255 (October 6, 1981). That summary lists the comity/injunction issue as well as issues of personal jurisdiction not relevant here.

2. Claims of Vexing and Harassing Action.

In arguing at pages 6 and 20 of their brief that petitioner's British Columbia action was vexing and harassing, respondents particularly emphasize that a motion for

summary judgment was brought by petitioner in that action immediately after the appearance by respondents' Canadian counsel. Unfortunately, respondents misconceive the significance of the "summary judgment" motion in the British Columbia courts. Such a motion, while labelled a motion for "summary judgment," has a different purpose and effect than does the motion with the same name in United States courts. Until 1977 as a matter of rule and after 1977 as a matter of general practice, motions for "summary judgment" are brought in British Columbia courts after the filing of the equivalent of a summons and after the appearance of defendant's counsel but prior to the filings of the statement of claims (the "Complaint") by plaintiffs and the answer by defendants. The purpose of the motion is to determine whether there is any defense to be tried. Issues of fact *as well as issues of law* will defeat such a motion. To the extent that the Federal District Court may have similarly misunderstood the significance of the British Columbia court proceedings, respondents' point only reemphasizes the importance of exercising "care and great constraint" in enjoining such proceedings. *Canadian Filters (Harwich), Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969).

3. The Compulsory Counterclaim Issue.

In arguing against the Writ, respondents rely heavily on the argument made to and relied on by the Ninth Circuit, that is, that the claim filed by petitioner in British Columbia is a compulsory counterclaim in respondents' Federal District Court action. (See Respondents' Brief, pp. 8-13.) Respondents' conclusion does not follow from the above argument since compulsory counterclaims are involved in all comity cases. If the claim in the foreign court did not arise out of the same facts and circumstances as the claim in the United States District Court, the questions

of injunction and comity would not arise.

The fact that the foreign claim may also be a compulsory counterclaim does not mean that the defendant can be *compelled* to bring it in the local court; it only means that if he does not bring it and the local court reaches judgment first, the defendant is barred by *res judicata* from further proceedings on the same claim.

There is little chance of the above occurring in the present action. The respondents have permitted their case to drift in the Federal District Court for six years and it still does not have a trial date. Petitioner's much simpler but very substantial contract claim would long since have been tried to final judgment in British Columbia. That fact is another reason why the district court should have exercised restraint when presented by respondents with the request for an injunction.

CONCLUSION

The decision below raises significant and recurring issues concerning the duty of an American court to exercise restraint in enjoining an action in the court of a foreign country. A Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

SCHWEPPE, DOOLITTLE, KRUG,
TAUSEND & BEEZER, P.S.

By_____
Fredric C. Tausend

By_____
James B. Street
Counsel of Record for Petitioner